Instrumech Engineering Sdn Bhd v Sensorlink Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO D9–24–150 OF 2000
RAMLY ALI JC
23 OCTOBER 2000

Companies and Corporations *— Winding up — Application to injunct presentation of winding up petition — Service of statutory notice on plaintiff company — Defendant yet to commence winding up proceedings — Whether notice was sufficient threat to plaintiff's right — Whether application pre-mature*

The defendant had served a statutory notice on the plaintiff pursuant to s 218 of the Companies Act 1965. The plaintiff filed an originating summons applying for an order that the defendant be restrained by an injunction from presenting a petition for winding-up against the plaintiff upon expiry of the statutory notice until the claim which is disputed by the plaintiff is determined and/or resolved by the court. The defendant raised a preliminary objection that the originating summons disclosed no cause of action and failed to comply with O 7 r 3(1) of the Rules of the High Court 1980 ('the RHC'). It was also submitted that the plaintiff's action was pre-mature as the defendant had yet to file any winding-up proceeding against the plaintiff.

Held, dismissing the preliminary objection:

(1) The plaintiff's originating summons had fulfilled the ingredients of the second limb of r 3(1) in that it included a concise statement of the relief or remedy claimed in the proceedings with sufficient particulars to identify the cause of action in respect of which the plaintiff claimed that relief or remedy (see pp 130F, 131F).

(2) The notice under s 218 was a sufficient threat to the plaintiff's right, especially when the debt was disputed. The plaintiff does not have to wait for the actual petition for winding up to be filed and served on them. The court was satisfied that the plaintiff's application for injunction as in the originating summons was not pre-mature as contended by the defendant (see pp 133E, 134E).

[**Bahasa Malaysia summary**

Pihak defendan telah menyampaikan notis berkanun ke atas plaintif mengikut s 218 Akta Syarikat 1965. Pihak plaintif seterusnya memfailkan saman pemula meminta injunksi supaya defendan disekat daripada manyampaikan petisyen penggulungan terhadap plaintif, setelah notis berkanun tersebut luput sehingga kes yang dipertikaikan oleh plaintif diselesaikan oleh mahkamah. Defendan membangkitkan bantahan permulaan menyatakan bahawa saman pemula plaintif tidak mendedahkan apa-apa kausa tindakan dan gagal mematuhi A 7 k 3(1)

Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Defendan juga telah menyatakan bahawa plaintif telah bertindak dengan terlalu awal kerana defendan masih belum memfailkan sebarang tindakan penggulungan terhadap plaintif.

Diputuskan, membatalkan bantahan permulaan tersebut:

(1) Saman pemula plaintif adalah selaras dengan bahagian kedua k 3(1) kerana ia mempunyai pernyataan relief yang dituntut di dalam kes dengan adanya butir-butir yang mendedahkan kausa tindakan dengan secukupnya (lihat ms 130F, 131F).

(2) Notis dibawah s 218 dikira sebagai ancaman wajar kepada plaintif, terutamanya kerana hutang tersebut masih dipertikaikan. Plaintif tidak diperlukan menunggu sehingga petisyen penggulungan tersebut difailkan dan disampaikan ke atas mereka. Mahkamah berpuas hati bahawa permohonan plaintif untuk injunksi seperti dalam saman pemula plaintif tidak terlalu awal (lihat ms 133E, 134E).]

Notes

For cases on winding up generally, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 760–1151.

Cases referred to

Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 230 (refd)

Lee Eng Eow (as Director of Lee Guat Cheow & Co Sdn Bhd) v Mary Lee as Executrix of the Estate of Low Ai Lin, deceased & Anor [1999] 3 AMR 2885 (refd)

Letang v Cooper [1965] 1 QB 232 (refd)

Malayan Flour Mill Bhd v Raja Lope and Tan Co [2000] 3 AMR 3750 (refd)

Platinum Heights Sdn Bhd v Sun Mix Concrete Sdn Bhd [1997] 1 MLJ 418 (refd)

Sarkawi bin Sadijo (t/a Jojo's Musical & Promotion House) v BMG Music (M) Sdn Bhd & Ors [1996] 4 MLJ 515 (refd)

Stonegate Securities Ltd v Cregory [1980] 1 Ch 576 (refd)

Legislation referred to

Companies Act 1965 ss 218, (2)(a)

Rules of the High Court 1980 O 7 r 3(1), O 29 r 1

Specific Relief Act 1950 s 51(1)

Winding-Up Rules 1972

James Selva (*Aini Othman* with him) (*Ong Kok Bin & Co*) for the plaintiff.

KW Yap (*Yap Cheng & Partners*) for the defendant.

Ramly Ali JC:

Introduction

In early June 2000, the defendant had served a copy of a statutory notice dated 31 May 2000 pursuant to s 218 of the Companies Act 1965, on the plaintiff. The said statutory notice alleged that the plaintiff had a balance outstanding of RM71,523 being the amount due and owing in respect of goods sold and delivered by the defendant to the plaintiff, at the plaintiff's request. As usual in such a statutory notice, the defendant had also notified the plaintiff that in the event of the plaintiff's failure to make payment of the said sum as demanded within 21 days from the date of service of the notice, the plaintiff would be deemed unable to pay its debts pursuant to s 218(2)(a) of the Companies Act 1965, and proceedings will thereafter be commenced to wind up the plaintiff pursuant to the Companies Act 1965.

On 8 July 2000, the plaintiff filed its originating summons applying for the following orders:

(i) that the defendant be restrained by an injunction from presenting a petition for winding up against the plaintiff upon expiry of the statutory notice pursuant to s 218 of the Companies Act 1965 which was served on the plaintiff in June 2000 until the claim which is stipulated in the said notice and that which is disputed by the plaintiff is determined and/or resolved by this honourable court pursuant to the civil suit to be filed herein; or

(ii) In the event a petition for winding up has been filed the defendant be restrained by an injunction from serving the same on the plaintiff until the plaintiff's claim in the civil action to be filed herein is determined and/or resolved by this honourable court; or

(iii) In the event a petition for winding up has been served by the defendant, an injunction to restrain the defendant from advertising the petition and from further proceeding with the petition until the claim as stipulated in the statutory notice issued pursuant to s 218 of the Companies Act 1965 and that which is disputed by the plaintiff is determined and or resolved by this honourable court; and

(iv) The costs of this application be borne by the defendant; and

(v) Such further or other relief as this honourable court deems fit to grant.

Preliminary objection

At the hearing of the said originating summons on 12 October 2000, the counsel for the defendant raised a preliminary objection to the effect that the said originating summons had disclosed no cause of action and had failed to comply with O 7 r 3(1) of the Rules of the High Court 1980 ('the RHC'). Thus the said originating summons must be dismissed with costs.

Submissions by defendant's counsel

The counsel for the defendant submitted that the said originating summons contained three main prayers for injunction, ie prayers (i), (ii) and (iii). He contended that prayers (ii) and (iii) thereof are not relevant at this material time because the defendant had not filed any winding-up petition against the plaintiff yet. Only prayer (i) is relevant and needs to be considered at this stage. (The counsel for the plaintiff is deemed to agree on this point).

The defendant's counsel submitted that the plaintiff's application for injunction is based on no provision of law; that prayer (i) discloses no cause of action as required under O 7 r 3(1) Rules of the High Court; and that the plaintiff's action is premature on the ground that the defendant had only served the plaintiff with a statutory notice under s 218 of the Companies Act 1965 but had not filed any winding-up proceedings against the plaintiff yet. In support of his submissions, the counsel for the defendant cited the following cases: *Sarkawi bin Sadijo (t/a Jojo's Musical & Promotion House) v BMG Music (M) Sdn Bhd & Ors* [1996] 4 MLJ 515; *Platinum Heights Sdn Bhd v Sun Mix Concrete Sdn Bhd* [1997] 1 MLJ 418; *Lee Eng Eow (as Director of Lee Guat Cheow & Co Sdn Bhd) v Mary Lee as Executrix of the Estate of Low Ai Lin, deceased & Anor* [1999] 3 AMR 2885.

Submission by plaintiff's counsel

The counsel for plaintiff submitted that the originating summons was based on s 51(1) Specific Relief Act 1950 and O 29 r 1 Rules of the High Court. He also submitted that a threat of a winding-up petition as stated in the statutory notice under s 218 of the Companies Act 1965 served on the plaintiff by the defendant is sufficient to constitute a cause of action. The plaintiff does not have to wait for the actual winding-up petition to be filed and served on them before filing for originating summons for injunction. He further submitted that the said originating summons, particularly prayer (i) thereof, contained a concise statement of the relief or remedy claimed in the proceedings with sufficient particulars to identify the cause of action, ie that the defendant had issued and served a notice under s 218 of the Companies Act 1965 on a claim that is seriously disputed by the plaintiff. Besides that the originating summons also identified the remedy sought and the parties involved. As such the plaintiff's counsel submitted that the preliminary objection by the defendant be dismissed with costs and the hearing for the originating summons should proceed.

Issue

The issue before the court now is whether the said originating summons (encl 1) particularly prayer (i) thereof, includes a statement of the question on which the plaintiff seeks the determination or direction of the court or a concise statement of the relief or remedy claimed in the proceedings with sufficient particulars to identify the cause of action in respect of which the plaintiff claims that relief or remedy, as required under O 7 r 3(1) RHC 1980.

Findings of the court

The relevant rules relating to application for injunction are governed by s 51(1), Specific Relief Act 1950 and O 29 r 1 of the RHC 1980. Usually these provisions are not specifically cited in the prayer in the originating summons. It is sufficient to state those provisions in the geveral heading of the originating summons. In our present case, the geveral heading of the plaintiff's originating summons contains both the relevant provisions. That is sufficient to indicate that the application for injunction was made based on both provisions of the law.

The preliminary objection by the defendant raised issues relating to O 7 r 3(1) RHC which reads as follows:

> (1) Every originating summons must include a statement of the question on which the plaintiff seeks the determination or direction of the High Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.

It is not disputed that the requirements under O 7 r 3(1) RHC are mandatory requirements. Looking at the said r 3(1), one can easily understand that there are two limbs in the said Rule. The plaintiff must satisfy any one of the two. Need not be both. The two limbs are as follows:

(i) a statement of the questions on which the plaintiff seeks the determination or direction of the High Court, or

(ii) a concise statement of relief or remedy claimed in the proceedings with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.

In our present case, the plaintiff's counsel contended that the originating summons had complied with the second limb of the said r 3(1). In my opinion, in order to satisfy the second limb of the said r 3(1), there are two important ingredients that must be fulfilled. They are:

(i) that the originating summons include a concise statement of the relief or remedy claimed; and

(ii) the statement must be with sufficient particulars to identify the cause of action.

To my mind, prayer (i) of the plaintiff's originating summons (encl 1) had fulfilled both the above ingredients, and thus had complied with O 7 r 3(1) of the RHC. The statement required under r 3(1) need not be lengthy. It should be concise ie with few words. Within that few words, prayer (i) had given a fairly clear picture as to what is the relief or remedy claimed — ie that the defendant be restrained by an injunction from presenting a winding-up petition against the plaintiff until the claim which is stipulated in the notice under s 218 of the Companies Act 1965 is determined or resolved by the court pursuant to the civil suit to be filed. The said prayer (i) had also given sufficient particulars to identify the cause of action. What

is 'a cause of action'? Syed Agil Barakbah SCJ (as he then was) in *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230 defined it this way at p 236:

> A cause of action is simply a factual situation the existence of which entitles a plaintiff to obtain from the court a remedy againsts the defendant.

Lord Diplock in *Letang v Cooper* [1965] 1 QB 232 at p 242 defined 'cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person'.

In my view the 'factual situation' mentioned in both the above cases must be a question of fact which may differ from one case to another. In our present case the defendant had issued and served on the plaintiff, in June 2000, a statutory notice pursuant to s 218 of the Companies Act 1965 demanding a certain amount of money, which is disputed by the plaintiff. Legally, a notice under s 218 of the Companies Act 1965 usually would bring two issues to the attention of the recipient (the plaintiff in this case) — ie (i) a demand for the recipient to pay a certain amount of money as 'debt due' within 21 days from the date of receipt of the notice and ii) to notify the recipient (the plaintiff) that in the event the plaintiff fails to make payment of the sum demanded or to secure or compound for the said sum to the reasonable satisfaction of the defendant, within the 21 days, the plaintiff will be deemed unable to pay its debt pursuant to s 218(2)(a) of the Companies Act 1965 and proceedings will thereafter be commenced to wind-up the plaintiff pursuant to the said Act. After the expiry of the said 21 days period; the defendant can straight away file for a winding-up petition againsts the plaintiff and after that the related procedure under the Winding-Up Rules 1972 shall apply.

The counsel for the defendant had argued that the plaintiff's action for injunction at this stage is premature because the defendant had just given a notice under s 218 of the Companies Act 1965, but had not filed any petition for winding-up yet. In other words, what the counsel is saying is that the plaintiff must wait for a proper winding-up petition to be filed and served on him first before filing for the said originating summons for injunction. He argued that the service of the notice is premature and thus does not constitute sufficient cause of action. With due respect, I am not able to agree with the defendant counsel on this point. The notice under s 218 of the Companies Act 1965, in law, is a sufficient threat that the plaintiff's right or interest may be challenged after the expiry of the 21 days period. In *Ford's Principles of Corporation Law* (6th Ed) by HAJ Ford and RP Austin (at p 818), it was stated that:

> An application for winding-up even if subsequently dismissed as being ill founded, can damage a solvent company's reputation. For that reason a company may be able to pursuade the court at an early stage, before the filing of an application or before the advertising of a application, to issue, in exercise of its inherent jurisdiction, to restrain filing or advertisement or both as an abuse of the court's process.

In my earlier judgment in the case of *Malayan Flour Mill Bhd v Raja Lope & Tan Co* [2000] 3 AMR 3750 (at p 3759), I have stated that:

> In the event a winding-up petition is presented against the plaintiff , the statutory restrictions which would arise make it virtually impossible for the plaintiff to carry on its own business activities. The presentation of a winding-up petition and its advertisements as required by the Winding-Up Rules 1972 would cause irreparable damages to the plaintiff given that the business and credit reputation of the plaintiff would be immeasurably harmed and injured by the presentation and advertisement of the petition which cannot be compensated in damages. Moreover, the presentation of the winding-up petition may be construed as a breach on the part of the plaintiff under its other agreements with other parties. Further, in the event of the banks being advised of the winding-up petition, the plaintiff's bank account may be frozen and this will have adverse effects on the plaintiff's business operation and financial position.

In *Stonegate Securities Ltd v Cregory* [1980] 1 Ch 576 at p 588, [1980] 1 All ER 241 at p 249, Goff LJ had held that a statutory demand is a threat to present a winding up petition.

In 7(3) *Halsbury's Law of England* (14th Ed, 1996 Reissue) at p 1552, para 2211, it was stated that there are four main processes which may be initiated by a company which wishes to defend a petition or threatened petition (for winding-up). His first process is that if the company has notice that a petition will or may be presented against it, the company may apply to restrain the presentation of the petition.

On the above authorities, I am convinced that the notice under s 218 of the Companies Act 1965 is a sufficient threat to the plaintiff's right, especially when the debt is disputed. The plaintiff does not have to wait for the actual petition for winding-up to be filed and served on them. By that time damage may have been done.

I now turn to the authorities cited before me by the counsel for the defendant. I agree that the principle laid down in all the three cases cited by the counsel for defendant are the same, ie that an originating summons must contain a cause of action or at least a concise statement of the relief or remedy claimed with sufficient particulars to identify the cause of action. However, as a 'factual situation', a cause of action, which is based on the facts of each particular case differs from one case to another. In other words, the legal principles in those three cases cited are applicable in our present case, but the finding of facts may not be the same.

In *Sarkawi bin Sadijo*'s case, the court dismissed the application for injunction on the ground that the plaintiff had failed to show that he had a cause of action because the very substratum of the plaintiff's case, ie the main agreement between the parties concerned had not been exhibited in his affidavit. The court had gone into the affidavit filed by the plaintiff in support of his application, while in our present case, we are only at the stage of the format and content of the originating summons. In *Lee Eng Eow*'s case, the Court of Appeal, appalled at the laxity of the person responsible for the 'shoddy drafting' of the originating summons, had described it as 'a most strange document', for not identifying their cause of action against the defendant. The defendant had not been properly identified. Looking at the content of the lengthy originating summons in that case, we cannot run

away from the conclusion that the said document disclosed no cause of action at all. In that case, a company is being sued, not in the name of the company, but in the name of one of its directors by people who are not even members of the company, knowing fairly well that a limited company has a separate legal personality of its own. It can only sue or be sued in its own name. In the last case referred to, ie *Platinum Height*, I think the finding of facts in this case should not be applicable to our present case. In that case, the court held that the debt due was not disputed by the plaintiff, while in our present case, the debt had been disputed all along by the plaintiff. The contents and format of the originating summons in that case is far cry from the originating summons in our present case. In that case, the originating summons merely contained the prayers it wished for as follows:

(a) Penentang dilarang memfailkan dan/atau meneruskan petisyen penggulungan terhadap pemohon sehingga perintah lanjutan.

(b) Gantirugi ditaksir oleh penolong kanan pendaftar.

(c) Kos dalam kausa.

(d) Apa-apa relief lain yang dianggap munasabah oleh mahkamah.

It was rightly held in that case that the said originating summon did not contain any such statement of questions for the court's determination or direction nor was there a concise statement of the relief or remedy claimed and wether was there a statement with suffficient particulars to identify the cause of action.

Decision of the court

Accordingly, I am satisfied that the plaintiff's application for injunction as in the originating summons (encl 1) is not premature as contended by the counsel for the defendant. I am also satisfied that said originating summons particularly prayer (i) thereof, includes a concise statement of the relief or remedy claimed in the proceedings with sufficient particulars to identify the cause of action in respect of which the plaintiff claims that relief or remedy. As such, I am convinced that the plaintiff's originating summons (encl 1) has sufficiently complied with the requirements under O 7 r 3(1) RHC 1980. In the premise, the defendant's preliminary objection is overruled with costs. The hearing of the said originating summons to proceed.

Preliminary objection dismissed.

Reported by Jafisah Jaafar